



Docket No: RPC 0572 PUS
Serial No: 09/844,822

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3727

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPELLANT: William P. Apps, et al.

EXAMINER: Castellano

SERIAL NO.: 09/844,822

GROUP ART UNIT: 3727

FILED: April 26, 2001

FOR: Stackable Low Depth Bottle Case

ATTY DOCKET NO.: RPC 0572 PUS

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

SUBSTITUTE APPEAL BRIEF

This Substitute Appeal Brief is in response to the Notice of Non-compliance mailed February 11, 2005. This Substitute Brief is a substitute for the Appeal Brief filed November 1, 2004 pursuant to the Notice of Appeal filed August 30, 2004.

CERTIFICATE OF MAIL

I hereby certify that the enclosed Appeal Brief and all enclosures referred to herein are being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on March 11, 2005.

Konstantine J. Diamond

REAL PARTY IN INTEREST

The real party in interest is Rehrig Pacific Company, assignee of the present invention.

RELATED APPEALS AND INTERFERENCES

The parent of this application was previously appealed. The Board's decision is included in the Related Proceedings Appendix. The Board indicated that modification according to any suggestion from the D.W. Plastics reference would still leave the lower edge of the side wall straight. (Page 8 of Board Decision, February 26, 2001).

STATUS OF CLAIMS

Claims 1-3, 12-16 and 18-64 are pending, rejected and appealed.

STATUS OF AMENDMENTS

The Amendment After Final April 26, 2004 was not entered.

SUMMARY OF CLAIMED SUBJECT MATTER

The use of bottle cases for retaining and transporting bottles fulfills a variety of objectives. Bottle cases should be strong and durable, and should also be stable under stacking conditions. Low depth cases are sometimes used to store and transport bottles, but bottles stored therein can tilt away from vertical alignment upon stacking, thereby causing a stack of such cases to buckle and give way, causing the stack to fall. Even in the absence of buckling, the tendency of bottles to tilt in conventional low depth cases leads to instability if too many tiers are included in the stack. Low depth beverage bottle cases provide no label visibility for display purposes which indicate to the public the source of the goods, absent markings on the container. On the other hand, while high walled bottle cases may reduce the incidence of tilting and provide additional support when stacked, due to their size

they are relatively costly to ship and to store. They also do not provide a view as to the products stored therein, and are thus not easily identifiable with a particular beverage bottler, except by imprinted or painted logos or other insignia that may be applied thereto.

Referring to Figure 1 of the present application (reproduced below), the claimed invention is directed to a stackable low depth case (10) for retaining and transporting bottles and which includes opposing side walls (12, 16) and opposing end walls (14, 18) which form an outer shell having a longitudinal axis (46) and a transverse axis (40). (Page 6, lines 12-16). A case bottom (20) is disposed substantially within the outer shell. (Page 7, lines 1-4).

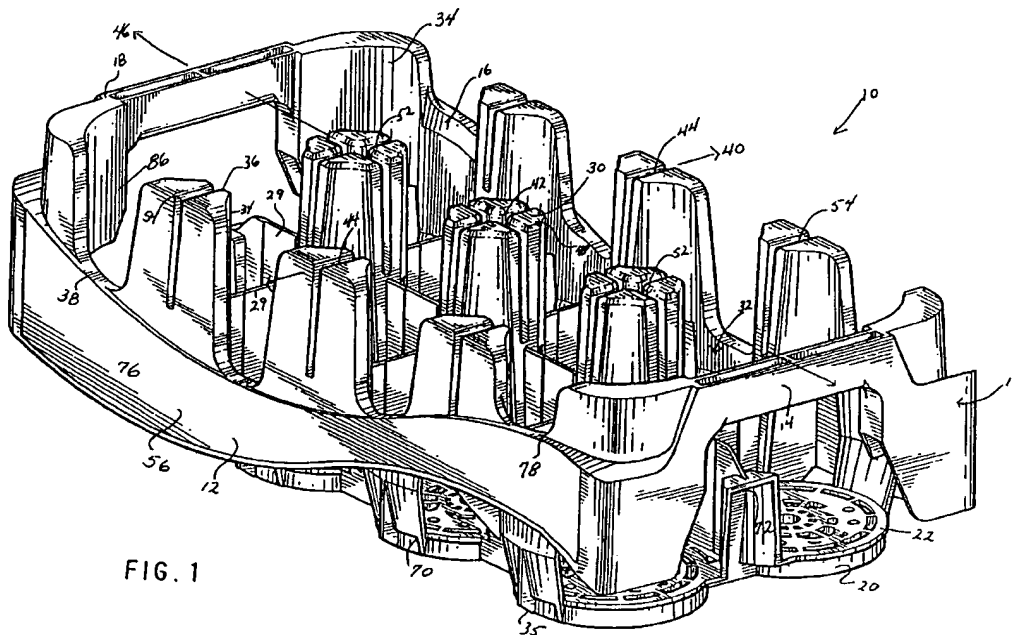


FIG. 1

Referring to Figure 2 (reproduced below), side walls (12, 16) include a lower wall portion (56), a plurality of spaced upwardly projecting pylons (58), and four corner pylons (58a) defining four corners of case (10). (Page 8, lines 11-15). Also included are a plurality of spaced upwardly projecting columns (30) which are generally disposed within the outer shell and which, in combination with case bottom (20), side walls (12, 16), and end walls (14, 18), define a plurality of bottle retaining pockets (32). (Figure 1; Page 10, lines 1-10). The columns (30) and pylons (58) extend above the lower wall portions (56), and below a top surface of the retained bottles. (Figure 1; Page 10, lines 10-12).

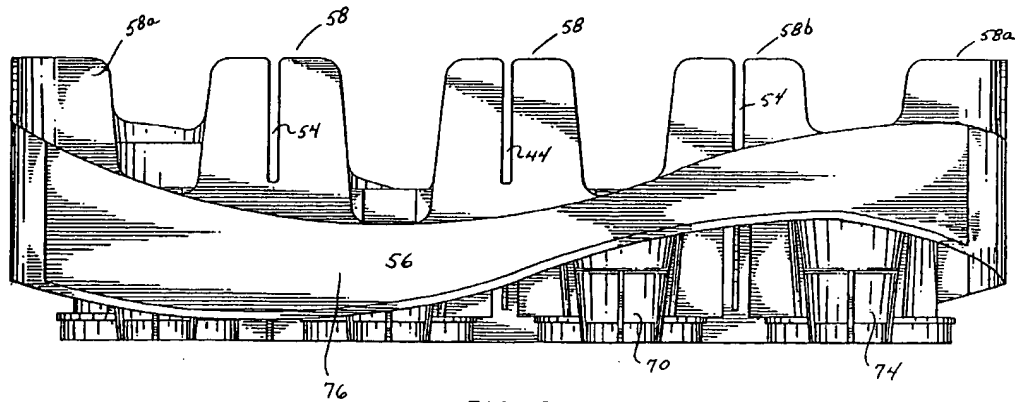


FIG. 2

In the parent application, the claims were directed to the shape of at least one of the lower wall portions (56), including the periphery thereof (78, 80), being substantially defined by an integrally molded logo (76) such that the logo (76) forms a structural basis for the at lower wall portion (56). In various embodiments, the logo (76) substantially defines at least a portion of the lower wall portion (56). (Figure 1; Page 9, lines 1-4).

In the previous appeal, the Board interpreted the term “logo” broadly and affirmed the rejection of the claims with the term “logo” as obvious. The Board also indicated that modification according to any suggestion from the cited references would still leave the lower edge of the side wall straight. (Page 8 of Board Decision, Related Proceedings Appendix). In the claims presently under appeal, the term “logo” has been removed. Instead, the invention is now directed toward the shape of the lower wall portion (or of two lower wall portions), for example, the upper and/or lower edges of the lower wall portion being “curved,” or the differing heights of two locations on the upper and/or lower edges of the lower wall portion. The independent claims are summarized below.

Independent claim 1 recites that the side walls (12, 16) include a lower wall portion (56) and a plurality of spaced upwardly projecting pylons (58), and that the lower wall portion (56) has an upper edge (78) having a curved shape and a lower edge (80) having a curved shape. (Figure 2; Page 8, lines 11-15).

Independent claim 12 recites, “each of the columns (30) including at least one vertical, longitudinal recess (48) opening upwardly and aligned with one another.” (Figure 1; Page 11, lines 15-17). Claim 12 further recites that each of the columns (30) includes a plurality of exterior surfaces each having an uppermost edge, each exterior surface partially defining one of the plurality of bottle retaining

pockets (32), the uppermost edge of one of the exterior surfaces of one of the columns (30) extending a first height above a first location along the upper edge (78) of one of the pair of side structural members (76), and the uppermost edge of one of the exterior surfaces of another of the columns extending a second height above a second location along the upper edge (78), wherein the second height is greater than the first height. (Figure 1).

Independent claims 29, 58, 59 and 64 recite, “a plurality of pylons (58) extending inwardly from the side structural members (76)” and “a plurality of spaced upwardly projecting columns (30) generally disposed within the inner compartment.” (Figure 1; Page 10, lines 1-10; Page 8, lines 11-15). Each of a pair of columns (30) is substantially the same height and each extends a first height above a first location on the lower edge (80). Another (third) column (30) has an uppermost surface that is coplanar with an uppermost surface of one of the plurality of pylons (58), and the another (third) column (30) is a second height (different from the first height) above a second location along the lower edge (80). (Figure 1; Page 9, lines 1-4; Page 8, lines 11-15).

Independent claim 45 recites that one of the columns (30) extends a first height above a first location along the upper edge (78) of one of the side structural members (76), and that the column (30) extends a second height above a second location along the upper edge (78) of the other side structural member (76) directly opposite the first location. The height of the first location and the second location are vertically offset. (Figure 1; Page 9, lines 1-4; Page 8, lines 11-15).

Independent claim 50 recites first and second columns (30) extending a first height above a first location along the upper edge (78) of one of the side structural members (76), and a third column (30) extending a second height (greater than the first height) above a second location along the upper edge (78) of the one of the pair of side structural members (76). (Figure 1; Page 9, lines 1-4; Page 8, lines 11-15).

Independent claim 60 recites that the lower edge (80) of the side wall (56) has a curved shape. (Figure 1; Page 9, lines 1-4; Page 8, lines 11-15).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

I) Claims 1-3 and 55-56 are rejected as indefinite.

II) Claims 29-31, 33-44 and 58, 59 and 64 are rejected as anticipated by Apps '874 (US 4,899,874).

III) Claims 1-3, 12-16, 18-40 and 42-64 are rejected as obvious over Apps '874 in view of Kelly (Des. 371,239) and Kappel (2,970,715) and Ex. 2 from D.W. Plastics.

IV) Claims 12-16 and 18-28 are rejected as obvious over Apps '874 in view of Wallace (4,101,049) Kelly, Kappel, and Ex. 2 from D.W. Plastics.

V) Claims 24, 25, 40 and 41 are rejected as obvious over Apps '874, Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey.

VI) Claims 24, 25, 40 and 41 are rejected as obvious over Apps '874, Wallace, Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey.

VII) Claims 1-3, 12-16 and 18-55 are provisionally rejected under the judicially created doctrine of double-patenting over claims 1-16 of co-pending Application No. 09/626,517.

VIII) Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double-patenting over claims 1-30 of U.S. Patent No. 5,660,279.

IX) Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double-patenting over claims 1-16 of U.S. Patent No. 5,651,461.

X) Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double-patenting over claims 1-9 of U.S. Patent No. 5,529,176.

XI) Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double-patenting over Figures 1-6 of U.S. Des. Patent No. 378,249.

ARGUMENT

Claims 1-3, 12-16 and 18-64 are pending, rejected and appealed.

D) Rejection Under §112, second paragraph

The Examiner has rejected claims 1-3 and 55-56 as indefinite. Although Appellant believes claim 1 to be clear as written, in the unentered Amendment After

Final, mailed April 26, 2004, Appellant offered in compromise to address the Examiner's §112 rejection by simply removing one of the additions to claim 1 from the previous amendment. This Amendment should have been entered, but claim 1 is clear in its current form.

Claim 1 recites, "each of said side walls including a lower wall portion . . . wherein the lower wall portion includes an upper edge and a lower edge . . ." The Examiner rejected claim 1 as indefinite saying, "it can't be determined which of the lower walls portions is being referred to since there are at least two opposing side walls and each side wall has a lower portion." [Final Rejection, page 2].

Claim 1 is clear and definite because it recites "each of said side walls including a lower wall portion . . . wherein the lower wall portion includes . . ." thus clearly referring to the same lower wall portion that "each of said side walls includes." Thus, there is no ambiguity as to which lower wall portion is referenced - the claim references both of them.

II) Anticipation Rejection Over Apps '874

The Examiner has rejected claims 29-31, 33-44 and 58, 59 and 64 as anticipated by Apps '874 (US 4,899,874).

Claims 29, 58, 59 and 64 recite "a plurality of pylons extending inwardly from the side structural members" and "a plurality of spaced upwardly projecting columns generally disposed within the inner compartment." Each of a pair of columns is substantially the same height and each extends a first height above a first location on the lower edge. Another (third) column has an uppermost surface that is coplanar with an uppermost surface of one of the plurality of pylons, and the another (third) column is a second height above a second location along the lower edge.

Figure 1 from Apps '874 is reproduced below.

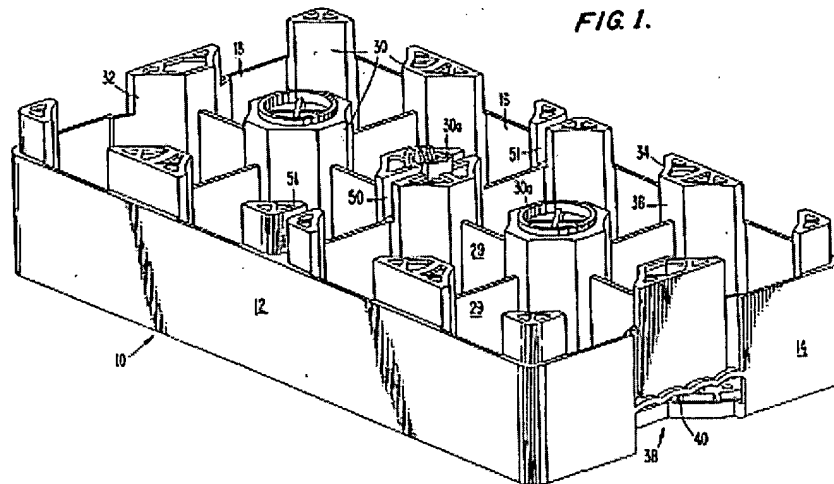


Figure 1 of Apps '874

As shown, Apps '874 does not have another (third) column that has an uppermost surface that is substantially co-planar with an uppermost surface of one of the plurality of pylons, as required by these claims. Apps '874 discloses three columns, two of which are the same height. The third column (the center column) does not have an uppermost surface that is coplanar with an uppermost surface of the one of the pylons. Rather, the uppermost surface of the center column extends significantly above the uppermost surfaces of the pylons.

III) Obviousness Rejection Over Apps '874 and Kelly and Kappel and Ex. 2

The Examiner has rejected claims 1-3, 12-16, 18-40 and 42-64 as obvious over Apps '874 in view of Kelly (Des. 371,239) and Kappel (2,970,715) and Ex. 2 from D.W. Plastics.

Claims 12-16 and 18-28

On Page 5 of the February 25, 2004 Final Rejection, the Examiner admits that these references do not disclose, "at least one vertical, longitudinal recess opening upwardly and aligned with one another," as required by claims 12-16 and 18-28. Therefore, claims 12-16 and 18-28 are not obvious over these references.

Claims 29-31, 33-40, 42-44, 58, 59 and 64

Claims 29-31, 33-40, 42-44, 58, 59 and 64 are not obvious for the same reasons that they are not anticipated as indicated above. Based upon the Examiner's comments, Appellant understands the Examiner's position to be that all of the terms

of the claims are found in the '874 reference alone. Otherwise, the Examiner has not set forth a *prima facie* argument for obviousness, *e.g.* identifying any differences between the claims and the prior art. Therefore, Appellant's arguments stated above are applicable and fully responsive.

Claims 1-3, 32, 41, 45-57 and 60-63

The Examiner has clarified that he is rejecting these claims in view of all four references in combination. (Final Office Action mailed February 25, 2004, page 7). The Examiner's proposed motivation for such a modification is not clear and is not found in any of the references.

The Examiner admits that Apps '874 does not disclose the upper edge and the lower edge having a curved shape. (Final Office Action mailed February 25, 2004, page 4). The Examiner argues that it would have been obvious to have employed the "integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics in modifying the shape of the lower wall portion . . ." However, there is no "integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics." The Examiner finds (or presumably finds) a different contour or wave-shape in each of these references, not a single, common "integrally molded contoured wave-shape." Just as there is no single, common shape in these references, there is no motivation in any one of them for modifying Apps '874 in the manner proposed by the Examiner.

First, Kelly discloses a wave-shaped side element on the outside of a beverage container case. The side element is spaced from the exterior of the side walls of the container case. The side walls of the container are straight and level, not wave-shaped. Therefore, even if one *were* motivated to modify Apps '874 in view of Kelly (even though there is no evidence of motivation), the side element would be spaced from the exterior of the side walls in Apps '874, which still have straight and level upper and lower surfaces. Therefore, Kelly does not render the claims obvious.

Next, Kappel discloses a curved portion (the Examiner referring to the portion near numeral 31 in Figure 2 of Kappel) below a handle in order to accommodate insertion of a hand. Apps '874 does not include a wall portion below the handle, which is where the curved edge in Kappel is located. There is no motivation for modifying the Apps '874 crate to curve a wall to accommodate insertion of a hand because in Apps '874 it is already completely open below the

handle. Viewed another way, there is nowhere to put the curved edge of Kappel in the crate of Apps '874 because there is no wall portion below the handle in Apps '874. Therefore, none of the claims are obvious over Apps '874 in view of Kappel.

The Examiner's use of Ex. 2 from D.W. Plastics is unclear. As is not disputed, the lower edge of the D.W. Plastics wall is straight, not contoured. The Board has indicated that modification according to any suggestion from D.W. Plastics would still leave the lower edge of the side wall straight. (Page 8 of Board Decision). Therefore, the claims would not be obvious over Apps '874 in view of Ex. 2 from D.W. Plastics.

Claim 45

Claim 45 specifies that first and second locations directly opposite one another on the upper edges of the two side structural members are vertically offset. Kelly shows a wave-shaped side element spaced away from an exterior of the side walls of a container. Although there is no motivation for making the modification proposed by the Examiner, as explained above, if one *were* to modify Apps '874 in accordance with Kelly (even using hindsight), one would attach the wave shaped side element to the exterior of the side walls of Apps '874, still leaving Apps '874 with straight upper and lower edges. In the present invention as claimed, the wave-shape is the side structural member (for example, claim 45 further specifies that the side structural members are "defining an inner compartment with the floor structure"). Therefore, Claim 45 is independently patentable.

Claims 24, 25, 40 and 41

For claims 24, 25, 40 and 41, it appears that the Examiner is calling walls 29 of Apps '874 part of the columns. This is contrary to the plain and ordinary meaning of the term "columns." The columns of Apps '874 are spaced away from the floor and supported by the walls 29 (See, e.g. Figure 2 of Apps '874). Therefore, claims 24, 25, 40 and 41 are independently patentable.

IV) Obviousness Rejections over Apps '874 in view of Wallace (4,101,049) Kelly, Kappel, and Ex. 2 from D.W. Plastics

The Examiner has rejected claims 12-16 and 18-28 as obvious over Apps '874 in view of Wallace (4,101,049) Kelly, Kappel, and Ex. 2 from D.W. Plastics. The Examiner first argues, "Apps discloses the bottle case except for the limitation

that each of the columns includes at least one vertical, longitudinal recess opening upwardly and aligned with one another.” [Final Rejection, page 5]. This is untrue.

Claim 12 recites:

each of the columns including a plurality of exterior surfaces each having an uppermost edge, each exterior surface partially defining one of the plurality of bottle retaining pockets, the uppermost edge of one of the exterior surfaces of one of the columns extending a first height above a first location along the upper edge of one of the pair of side structural members, wherein the first location is disposed between a pair of adjacent pylons, and the uppermost edge of one of the exterior surfaces of another of the columns extending a second height above a second location along the upper edge, wherein the second height is greater than the first height.

The uppermost edges of the exterior surfaces of all of the columns of Apps ‘874 extend the same height above all of the locations along the upper edge of the side structural members.

The Examiner also argues, “it would have been obvious to add the recesses 20 [shown in Wallace] to the columns of Apps as motivated by the drainage these recesses provide to prevent water or leaked fluid from pooling and to prevent debris from collecting which would make the bottle case unsanitary and unsightly.” (Final Rejection, page 5). This is also untrue. Wallace discloses a Shipping Tray for Fruit that is formed from a single plastic sheet (Abstract). The posts 14 of Wallace are non-symmetrical about the tray, such that when stacked in a rotated position, the pockets 11 of one tray are supported by the posts 14 of another (Figure 1 of Wallace). The grooves 20 in the upper surfaces of the posts 14 cooperate with holes 13 in the pockets 11 to promote air circulation and drainage of water. However, the crate of Apps ‘874 is symmetrical and already has plenty of openings throughout for drainage and air circulation. Additionally, the Apps ‘874 crate is not designed for fruit, so drainage and air circulation are not nearly as important as they are in Wallace. Therefore, there is no motivation to modify Apps ‘874 to add the recesses of Wallace.

V) Obviousness Rejection Over Apps ‘874, Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey

The Examiner has rejected claims 24, 25, 40 and 41 as obvious over Apps ‘874 in view of Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey (U.S. Patent

No. 2,928,530). First, these claims are not obvious for the same reason that the independent claims are not obvious, as explained above. Additionally, there is no motivation for this additional proposed modification to App '874 in view of Sauey.

The Examiner's proposed motivation is "to prevent the contents from slipping through an opening." However, this motivation is not found in either Sauey or Apps '874. There is no reason to believe (and in fact it appears impossible) that bottles could slip through the opening under the walls 29 of Apps '874.

Additionally, Sauey is a box for shotgun shells. One of ordinary skill in the art in beverage cases would not look to shotgun shell boxes for suggestions for modifying low-depth beverage cases. For example, Apps '874 makes provisions for making sure that the empty beverage cases will nest to reduce their stacked height because beverage cases are frequently reused. In particular, Apps '874 indicates that the purpose of the gap between the floor and columns is to accommodate stacking (and partially nesting) without having to taper the columns. (Apps '874 column 6, lines 44-52). In contrast, the shotgun shell box of Sauey cannot nest and makes no provisions for stacking empty boxes at a reduced stacking height. It would be contrary to the stated purpose in Apps '874 to extend the columns down to the floor, as this would interfere with stacking the empty cases at a reduced height without tapering the columns. Therefore, claims 24, 25, 40 and 41 are independently patentable.

Claims 25 and 41

Even if Apps '874 were so modified in accordance with Sauey, the columns would not extend down below the lower edge of the side structure as required by claims 25 and 41. The columns in Sauey do not extend below the side walls.

VI) Obviousness Rejection Over Apps '874, Wallace, Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey.

The Examiner has (in the alternative to the previous rejection above) rejected claims 24, 25, 40 and 41 as obvious over Apps '874 in view of Wallace, Kelley, Kappel, Ex. 2 from D.W. Plastics and Sauey. Because this alternative rejection also includes the Sauey reference, Appellant's arguments are identical in this alternative rejection¹. First, these claims are not obvious for the same reason that the

¹ Although presented a single time in the original Appeal Brief, this identical argument is reproduced separately under this heading in response to the Examiner's Notice of Non-Compliance.

independent claims are not obvious, as explained above. Additionally, there is no motivation for this additional proposed modification to App '874 in view of Sauey.

The Examiner's proposed motivation is "to prevent the contents from slipping through an opening." However, this motivation is not found in either Sauey or Apps '874. There is no reason to believe (and in fact it appears impossible) that bottles could slip through the opening under the walls 29 of Apps '874.

Additionally, Sauey is a box for shotgun shells. One of ordinary skill in the art in beverage cases would not look to shotgun shell boxes for suggestions for modifying low-depth beverage cases. For example, Apps '874 makes provisions for making sure that the empty beverage cases will nest to reduce their stacked height because beverage cases are frequently reused. In particular, Apps '874 indicates that the purpose of the gap between the floor and columns is to accommodate stacking (and partially nesting) without having to taper the columns. (Apps '874 column 6, lines 44-52). In contrast, the shotgun shell box of Sauey cannot nest and makes no provisions for stacking empty boxes at a reduced stacking height. It would be contrary to the stated purpose in Apps '874 to extend the columns down to the floor, as this would interfere with stacking the empty cases at a reduced height without tapering the columns. Therefore, claims 24, 25, 40 and 41 are independently patentable.

Claims 25 and 41

Even if Apps '874 were so modified in accordance with Sauey, the columns would not extend down below the lower edge of the side structure as required by claims 25 and 41. The columns in Sauey do not extend below the side walls.

Double-Patenting Rejections

The Notice of Non-Compliance indicates that Appellant's arguments should be repeated under five separate headings. For efficiency, the argument will be incorporated by reference under separate headings below to the extent possible. In general, the Examiner does not present a *prima facie* case of double-patenting for any of the 46 pending claims, despite the vast number (71) of pending and issued claims upon which the Examiner bases the rejections. Left to guess, Appellant would have to compare each of the 46 to each of the 71 co-pending and issued

claims, giving 3,266 possible rejections that the Examiner may or may not be making here.

VII) Double-patenting Rejection Over Claims 1-16 of Application No. 09/626,517

The Examiner has rejected claims 1-3, 12-16 and 18-55 under the judicially created doctrine of double patenting over claims 1-16 of Application No. 09/626,517. The Examiner has not set forth a *prima facie* case of double-patenting. The fact that these claims contain some common subject matter as some claims in other patents and patent applications is insufficient. The particular “common subject matter” recited by the Examiner in this case is “A stackable low depth case comprising side walls, end walls, bottom, pylons and columns” - - features that are also found in the prior art.

In the Final Rejection, the Examiner further muddled the waters by attempting to “clarify” that he is not making an obviousness-type double-patenting rejection. (Page 8 of Final Rejection mailed February 25, 2004). Rather, the Examiner cites *In re Schneller*. That case describes a *rare* type of double-patenting rejection (MPEP 804 (II)(B)(2)) and is not applicable here. Further, “approval of the [Examiner’s SPE and] TC Director must be obtained before such a nonstatutory double-patenting rejection can be made.” There is no indication that such approval was obtained here. Therefore, for this additional reason, the double-patenting rejections should be withdrawn.

VIII) Double-patenting Rejection Over Claims 1-30 U.S. Patent No. 5,660,279

The Examiner has rejected claims 1-3, 12-16 and 18-55 under the judicially created doctrine of double patenting over claims 1-30 of U.S. Patent No. 5,660,279. Appellant’s argument in Section VII) regarding the double-patenting rejection over Application No. 09/626,517 is hereby incorporated by reference. The same argument applies.

IX) Double-patenting Rejection Over Claims 1-16 U.S. Patent No. 5,651,461

The Examiner has rejected claims 1-3, 12-16 and 18-55 under the judicially created doctrine of double patenting over claims 1-16 of U.S. Patent No. 5,651,461.

Appellant's argument in Section VII) regarding the double-patenting rejection over Application No. 09/626,517 is hereby incorporated by reference. The same argument applies.

X) Double-patenting Rejection Over Claims 1-9 U.S. Patent No. 5,529,176

The Examiner has rejected claims 1-3, 12-16 and 18-55 under the judicially created doctrine of double patenting over claims 1-9 of U.S. Patent No. 5,529,176. Appellant's argument in Section VII) regarding the double-patenting rejection over Application No. 09/626,517 is hereby incorporated by reference. The same argument applies.

XI) Double-patenting Rejection Over Figures 1-6 of U.S. Design Patent No. 378,249

The Examiner has rejected claims 1-3, 12-16 and 18-55 under the judicially created doctrine of double patenting over Figures 1-6 of U.S. Design Patent No. 378,249. Appellant's argument in Section VII) regarding the double-patenting rejection over Application No. 09/626,517 is hereby incorporated by reference. The same argument applies.

Additionally, it should be noted in particular that the Examiner is making an *In re Schneller* type double-patenting rejection of these utility claims over a design patent. Double-patenting rejections between utility and design applications are rare, as are *In re Schneller* type double patenting rejections. The fact scenario of *In re Schneller*, to which the case is limited, requires the rejection of utility claims over other utility claims. Thus an *In re Schneller* type double patenting rejection of a utility application over a design patent is logically impossible.

CONCLUSION

For the above reasons, the rejections by the Examiner should be reversed. The Appeal Brief fee was paid previously with the original Appeal Brief. If any additional fees or extensions are due, please charge Deposit Account No. 50-1984.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Konstantine J. Diamond', written over a horizontal line.

Date: March 11, 2005

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CLAIMS APPENDIX

1. A stackable low depth case for retaining and transporting bottles, the case comprising opposing side walls and opposing end walls forming an outer shell, a case bottom disposed substantially within said outer shell, the case comprising:

each of said side walls including a lower wall portion and a plurality of spaced upwardly projecting pylons, four corner pylons defining four corners of the case wherein the lower wall portion includes an upper edge and a lower edge, the upper edge having a curved shape substantially along the length thereof and the lower edge having a curved shape substantially along the length thereof; and

a plurality of spaced upwardly projecting columns generally disposed within the outer shell defining, in combination with the case bottom, said side walls, and said end walls, a plurality of bottle retaining pockets, said columns and said pylons extending above the lower wall portions and below a top surface of the retained bottles.

2. The stackable case of claim 1 wherein the upper and lower edges of the lower wall portion substantially define an exterior surface of said lower wall portion.

3. The stackable case of claim 2 wherein said lower wall portion further includes a plurality of retaining tabs substantially defining an interior surface of said lower wall portion and extending upwards from said case bottom.

4-11. (Cancelled)

12. A stackable low depth bottle case comprising:

a floor structure having an upper surface;

a pair of side structural members and a pair of end walls attached to the floor structure and defining an inner compartment with the floor structure, the side structural members having a lower edge and an upper edge, wherein the side structural members are longer than the end walls;

a plurality of pylons extending inwardly from the side structural members into the inner compartment, and a plurality of corner pylons defining corners of the case and extending into the inner compartment; and

a plurality of longitudinally-spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, each of the columns including at least one vertical, longitudinal recess opening upwardly and aligned with one another, each of the columns including a plurality of exterior surfaces each having an uppermost edge, each exterior surface partially defining one of the plurality of bottle retaining pockets, the uppermost edge of one of the exterior surfaces of one of the columns extending a first height above a first location along the upper edge of one of the pair of side structural members, wherein the first location is disposed between a pair of adjacent pylons, and the uppermost edge of one of the exterior surfaces of another of the columns extending a second height above a second location along the upper edge, wherein the second height is greater than the first height, wherein the second location is disposed between another pair of adjacent pylons, wherein at least one of the plurality of columns is located at the intersection of the case longitudinal axis and transverse axis and the uppermost edge of the exterior surface of the at least one of the plurality of columns is substantially co-planar with an uppermost edge of an exterior surface of one of the plurality of pylons, the exterior surface of the one of the plurality of pylons partially defining one of the plurality of bottle retaining pockets.

13. The case of claim 12, wherein each of the pair of side structural members is contoured along its length.

14. The case of claim 12, wherein the upper edge of each of the pair of side structural members is contoured along its respective length .

15. The case of claim 12, wherein the lower edge of each side structural member is wave-shaped along its respective length.

16. The case of claim 12, wherein the side structural members are attached to the floor structure by a plurality of retaining tabs which define an interior surface of the inner compartment between adjacent pylons.

17. (Cancelled)

18. The case of claim 12, wherein the plurality of columns are substantially the same height.

19. The case of claim 12, further comprising a pair of integrally molded handle structures directly connecting a pair of corner pylons and having an exterior surface and a generally open area being defined below the exterior surface.

20. The case of claim 12, wherein the floor structure has a substantially flat upper surface.

21. The case of claim 12, wherein the floor structure has a lower surface which includes plurality of bottle closure acceptance areas defined by generally conically shaped, concave portions.

22. The case of claim 12, wherein the floor structure includes resting and guiding means for resting the floor structure on the closures of bottles on which the case is stacked, the resting and guiding means including a rib formation having a longitudinal centerline offset from the centerline of the bottle retaining pockets to guide closures of bottles into a central region of the bottle retaining pockets.

23. The case of claim 22, wherein the rib formation comprises a cloverleaf shape.

24. The case of claim 12, wherein at least one of the columns has a vertically extending portion disposed below the lower edge of the side structural members.

25. The case of claim 12, wherein at least one of the columns has a vertically extending portion which is substantially co-planar with the lower surface of the floor structure.

26. The case of claim 12, wherein the plurality of pylons extend above the upper edge of the side structural members.

27. The case of claim 12, wherein the plurality of pylons have upper surfaces which are generally co-planar.

28. The case of claim 12, wherein the plurality of pylons and the plurality of columns have generally co-planar upper surfaces.

29. A low depth crate for storing and transporting bottles, the crate comprising:

a floor including a floor top surface having thereon a plurality of support areas for supporting an array of bottles;

a pair of side structural members and a pair of end walls attached to the floor and defining an inner compartment with the floor structure, the side structural members having a lower edge and an upper edge, wherein the side structural members are longer than the end walls;

a plurality of pylons extending inwardly from the side structural members into the inner compartment; and

a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, wherein each of a pair of the columns is of substantially the same height, and extends to an uppermost surface that is a first height above a first location along the lower edge of one of the pair of side structural members, and wherein another one of the columns has an uppermost surface that is a second height above a second location along the lower edge, wherein the second height is different from the first height, wherein the uppermost surface of the another one of the columns is substantially co-planar with an uppermost surface of one of the plurality of pylons.

30. The crate of claim 29, wherein the side structural members are contoured along their respective lengths.

31. The crate of claim 29, wherein the upper edge of the one of the pair of side structural members is contoured along its respective length.

32. The crate of claim 29, wherein the lower edge of each side structural member is wave-shaped along its respective length.

33. The crate of claim 29, wherein the side structural members are attached to the floor structure by a plurality of retaining tabs which define an interior surface of the inner compartment between adjacent pylons.
34. The crate of claim 29, wherein the another one of the columns is located at the intersection of the case longitudinal axis and transverse axis.
35. The crate of claim 29, wherein the plurality of columns are substantially the same height.
36. The crate of claim 29, further comprising a plurality of corner pylons defining corners of the case and extending into the inner compartment.
37. The crate of claim 36, further comprising a pair of integrally molded handle structures extending between a pair of corner pylons and having an exterior surface and a generally open area being defined below the exterior surface.
38. The crate of claim 29, wherein the floor has a substantially flat upper surface.
39. The crate of claim 29, wherein the floor has a lower surface which includes plurality of bottle closure acceptance areas defined by generally conically shaped, concave portions.
40. The crate of claim 29, wherein at least one of the columns has a vertically extending portion disposed below the lower edge of the side structural members.
41. The crate of claim 29, wherein at least one of the columns has a vertically extending portion which is substantially co-planar with a lower surface of the floor.
42. The crate of claim 29, wherein the plurality of pylons extend above the upper edge of the side structural members.

43. The crate of claim 29, wherein the plurality of pylons have upper surfaces which are generally co-planar.

44. The crate of claim 29, wherein the plurality of pylons and the plurality of columns have generally co-planar upper surfaces.

45. A stackable low depth bottle case comprising:

a floor structure having an upper surface;

a pair of opposed side structural members attached to the floor structure and defining an inner compartment with the floor structure, the side structural members having a lower edge and an upper edge;

a plurality of pylons extending inwardly from the side structural members into the inner compartment, and a plurality of corner pylons defining corners of the case and extending into the inner compartment; and

a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, wherein one of the columns extends a first height above a first location along the upper edge of one of the pair of side structural members, wherein the first location is disposed between a corner pylon and an adjacent pylon, and wherein the one of the columns extends a second height above a second location along the upper edge of the other side structural member directly opposite the first location, wherein the height of the first location and the height of the second location are vertically offset.

46. The case of claim 45, wherein the plurality of columns are substantially the same height.

47. The case of claim 45, wherein the plurality of pylons extend above the upper edge of the side structural members.

48. The case of claim 45, wherein the plurality of pylons and the plurality of columns are generally co-planar.

49. The case of claim 45, wherein at least one of the upper and lower edges of the side structural member is contoured along its length.

50. A stackable low depth bottle case comprising:

a floor structure having an upper surface;

a pair of side structural members attached to the floor structure and defining an inner compartment with the floor structure, the side structural members having a lower edge and an upper edge;

a plurality of pylons extending inwardly from the side structural members into the inner compartment, and a plurality of corner pylons defining corners of the case and extending into the inner compartment; and

a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, wherein a first column and second column each extend a first height above a predetermined first location along the upper edge of one of the pair of side structural members, wherein the predetermined first location is disposed between a pair of adjacent pylons, and wherein a third column is located at the intersection of the case longitudinal axis and transverse axis and extends a second height above a predetermined second location along the upper edge of the one of the pair of side structural members, wherein the second height is greater than the first height and wherein the second height to which the third column extends is substantially co-planar with an uppermost surface of one of the plurality of pylons.

51. The case of claim 50, wherein the plurality of columns are substantially the same height.

52. The case of claim 50, wherein the plurality of pylons extend above the upper edge of the side structural members.

53. The case of claim 50, wherein the plurality of pylons and the plurality of columns are generally co-planar.

54. The case of claim 50, wherein each of the upper and lower edges of the side structural members is wave-shaped along its length.

55. The case of claim 1 wherein a space between each adjacent pair of pylons along the side walls opens upwardly completely from the upper edge of the lower wall portion to a plane defined by uppermost surfaces of the adjacent pair of pylons to provide visibility of containers in the case.

56. The case of claim 1 wherein the side walls are longer than the end walls.

57. The case of claim 50 wherein the first location is different from the second location.

58. A low depth crate for storing and transporting bottles, the crate comprising:

- a floor including a floor top surface having thereon a plurality of support areas for supporting an array of bottles;

- a pair of side structural members and a pair of end walls attached to the floor and defining an inner compartment with the floor structure, at least one of the pair of side structural members having a lower edge and an upper edge;

- a plurality of corner pylons defining corners of the case and extending into the inner compartment;

- a plurality of pylons extending inwardly from the side structural members into the inner compartment between each pair of corner pylons on each side structural member; and

- a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, wherein each of a pair of the columns is of substantially the same height, and extends to an uppermost surface that is a first height above a first location along the lower edge, and wherein another one of the columns has an uppermost surface that is a second height above a second location along the lower edge, wherein the second height is different from the first height, wherein the uppermost surface of the another one of the columns is substantially co-planar with an uppermost surface of one of the plurality of pylons.

59. A low depth crate for storing and transporting bottles, the crate comprising:

a floor including a floor top surface having thereon a plurality of support areas for supporting an array of bottles;

a pair of side structural members and a pair of end walls attached to the floor and defining an inner compartment with the floor structure, one of the side structural members having a lower edge and an upper edge, the end walls each including a handle;

a plurality of pylons extending inwardly from the side structural members into the inner compartment; and

a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the floor structure and the side structural members, a plurality of bottle retaining pockets, wherein each of a pair of the columns is of substantially the same height, and extends to an uppermost surface that is a first height above a first location along the lower edge, and wherein another one of the columns has an uppermost surface that is a second height above a second location along the lower edge, wherein the second height is different from the first height, wherein the uppermost surface of the another one of the columns is substantially co-planar with an uppermost surface of one of the plurality of pylons.

60. A stackable low depth case for retaining and transporting bottles, the case comprising opposing side walls and opposing end walls forming an outer shell, a case bottom disposed substantially within said outer shell, the case comprising:

each of said side walls including a lower wall portion and a plurality of spaced upwardly projecting pylons, four corner pylons defining four corners of the case, wherein the lower wall portion of at least one of the side walls includes an upper edge and a lower edge, the lower edge having a curved shape substantially along the length thereof; and

a plurality of spaced upwardly projecting columns generally disposed within the outer shell defining, in combination with the case bottom, said side walls, and said end walls, a plurality of bottle retaining pockets, said columns and said pylons extending above the lower wall portions and below a top surface of the retained bottles.

61. The case of claim 60 wherein the upper edge has a curved shape substantially along the length thereof.

62. The case of claim 60 wherein the lower edge curves convexly and concavely.

63. The crate of claim 29, wherein at least some of pylons and at least some of the plurality of columns have generally co-planar upper surfaces.

64. A low depth crate for storing and transporting bottles, the crate comprising:

- a bottom portion having a top surface having thereon a plurality of support areas for supporting an array of bottles;

- at least one side structural member attached to the bottom member and defining an inner compartment with the bottom member, the at least one side structural member having a lower edge and an upper edge;

- a plurality of corner pylons defining corners of the case and extending into the inner compartment;

- a plurality of pylons extending inwardly from the side structural members into the inner compartment between each pair of corner pylons on each side of the at least one structural member; and

- a plurality of spaced upwardly projecting columns generally disposed within the inner compartment defining, in combination with the bottom member and the at least one side structural member, a plurality of bottle retaining pockets, wherein each of a pair of the columns is of substantially the same height, and extends to an uppermost surface that is a first height above a first location along the lower edge, and wherein another one of the columns has an uppermost surface that is a second height above a second location along the lower edge, wherein the first height is different from the second height, and wherein the uppermost surface of the another one of the columns is generally co-planar with an uppermost surface of at least one of the plurality of pylons.

RELATED PROCEEDINGS APPENDIX

1. Decision on Appeal from Board of Patent Appeals and Interferences, mailed February 26, 2001, for Application Serial No. 08/854,294 (parent of the present application).



The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 44

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM P. APPS and GERALD R. KOEFELDA

RPC 022, P43
Appeal No. 2000-0485
Application 08/854,294

HEARD: February 7, 2001

MAILED

FEB 26 2001

PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before CALVERT, FRANKFORT, and BAHR, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 to 17, all the claims in the application.

The appealed claims are drawn to a case or crate for retaining and transporting bottles. The claims as finally

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rejected are reproduced in Appendix A of appellant's brief.¹
Dependent claims 10, 11 and 13 to 16 were amended by an amendment
filed with the brief to conform their terminology to that of
parent claim 9.²

The references applied in the final rejection are:

Kappel et al. (Kappel)	2,970,715	Feb. 7, 1961
Apps et al. (Apps)	4,899,874	Feb. 13, 1990

Exhibit 2, identified in the Information Disclosure Statement
filed on June 6, 1996, as "Two photos of a prior art case of D.
W. Plastics" (hereinafter "D. W. Plastics").

Claims 1 to 17 stand finally rejected under 35 U.S.C.
§ 103(a) as unpatentable over Apps in view of Kappel and D.W.
Plastics.

On page 3 of the brief, appellants state that claims 1 to 17
stand or fall together. Accordingly, pursuant to 37 CFR
§ 1.192(c)(7), we select claim 1 from the group, and will decide
the appeal based thereon.

¹ In reviewing the claims, we note that the subject matter
recited in claim 17 is not shown in the drawings, as required by
37 CFR § 1.83(a). Also, it seems questionable whether this
subject matter was disclosed in the application as filed.

² Although the examiner says on page 2 of the answer that
this amendment "has been approved and entered", the amended
claims have not been clerically entered in the file.

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Claim 1 reads (letters in brackets added):

1. In a stackable low depth case for retaining and transporting bottles comprising opposing side walls and opposing end walls forming an outer shell having a longitudinal axis and a transverse axis; a case bottom disposed substantially within said outer shell; said improvement comprising:

[a] said side walls including a lower wall portion and a plurality of spaced upwardly projecting pylons, four corner pylons defining four corners of said case;

[b] a plurality of spaced upwardly projecting columns generally disposed within said outer shell defining, in combination with said case bottom, said side walls and said end walls, a plurality of bottle retaining pockets, said columns and said pylons extending above said lower wall portions and below a top surface of the retained bottles; and

[c] the shape of at least one of said lower wall portions, including the periphery thereof, being substantially defined by an integrally molded logo such that said logo forms a structural basis for said at least one lower wall portion.

Before considering the merits of the rejection, it is necessary to construe the meaning of the term "logo" in part [c] of the claim. As held in In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997):

the PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.

In the present case, appellants define "logo" on page 9, lines 1 to 9 of the specification, as follows:

The exterior lower wall portion 62 of side walls 12, 16 is defined by an integrally formed logo 76 or insignia which identifies the company. The company may be the bottler, the product within the bottle, the manufacturer of case 10 or any other company having an interest in being identified with the bottle case, the bottles or the product. "Logo" as used herein should be broadly interpreted to mean any geometric pattern, alphanumeric or written pattern, symbol, emblem, design, trademark or other identifier of the company or source of the goods, such as industry symbols, company mascots, company names, and the like.

Accordingly, we will construe the claim term "logo" in light of this definition.

Turning to the rejection, there is no dispute that Apps discloses a stackable low depth bottle case having the structure recited in parts [a] and [b] of claim 1. With respect to part [c], the lower wall portions 12 of the side walls of the Apps case have a rectangular peripheral shape which, being a "geometric pattern", would fall within appellants' definition of "logo" to that extent. Apps does not disclose that the rectangular shape of lower wall portions 12 constitutes a logo, but we take official notice³ that a logo may be rectangular in shape; see, for example, the logo of Sealtest Dairies, a company

³ See In re Ahlert, 424 F.2d 1088, 1091, 165 USPQ 418, 420-21 (CCPA 1970).

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in the food and beverage industry, shown as No. 239 on page 49 of the attachment.⁴ Thus, since the peripheral shape of the rectangular lower wall portion 12 of the Apps case has the peripheral shape of a rectangular logo, all three parts [a], [b] and [c] of claim 1 are readable on Apps alone, and it is unnecessary to consider the Kappel or D.W. Plastics references.

Although the foregoing conclusion would be dispositive of this appeal, we will for the sake of completeness consider the rejection as made by the examiner.

Kappel discloses a molded "low depth" bottle case having rectangular side wall portions 10, 11. As disclosed at col. 3, lines 21 to 26:

During the molding operation, a particular brand name 27, slogan 28, or other indicia, may be molded into the recessed areas 25 and 26 as an integral part of the walls. The indicia, as shown, is preferably molded with raised letters, which thereby increases the appeal of the particular advertising involved.

The two D.W. Plastics photographs are of a "high wall" (full depth) bottle case, apparently molded out of plastic. At the bottom portion of the side wall (top photo) and end wall (bottom photo) is a raised area carrying a company name ("Coca-Cola®"),

⁴Capitman, American Trademark Designs (Dover 1976), pp. 48 and 49.

the upper edge of this area extending from one side of the case to the other and being in the shape of a curve or wave (similar to upper logo edge 78 of appellants' disclosed case).⁵

On page 2 of the final rejection (Paper No. 26), the examiner states the basis of the rejection as:

It would have been obvious to one of ordinary skill in the art to have employed the internally molded logo teaching of Kappel, et. al. in a peripheral logo shape as taught by Exhibit 2 from D.W. Plastics in the construction of the device of Apps, et. al. (874), motivated by the consumer exposure and durability of such construction. It would have been obvious to one of ordinary skill in the art to have had the logo define the interior and exterior surfaces of the lower wall portions of the above set forth device, motivated by the increased logo exposure to be achieved thereby.

After fully considering the record in light of the arguments presented by appellants and the examiner, we conclude that the rejection is well taken.

Appellants argue that the D.W. Plastics case is a high wall (full depth) case with a window in the side wall, and the window does not interrupt the top edge of the side, i.e., the periphery of the side is rectangular. They contend that there would be no

⁵ Although appellants seem to be of the opinion that the curve is only at the bottom edges of the windows in the walls of the D.W. Plastics case, it is evident from the photographs that the curve or wave shape extends completely across each of the side and end walls.

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need or suggestion to add the window of the D.W. Plastics case to the shorter walls of Apps, and that (brief, page 7):

The only feature of the D.W. Products case that departs from the side wall's generally orthogonal elements is the "window" having a curved lower edge. Perhaps that curved edge is the "peripheral logo shape" about which the Examiner remarks in the Office Action? (Page 2, *Final Office Action, July 21, 1998.*) It is unclear, but even if this is the case, Appellant's claimed language is still not met. It cannot be said that the peripheral shape of the lower window edge is "substantially defined" by the logo shape, as required by Appellant's claims. It also cannot be said that the window or its lower edge even serve as a logo, as claimed by Appellant[s]. Without more, these features cannot be read into the D.W. Plastics reference in hindsight.

These arguments are not persuasive. Apps discloses at col. 2, lines 16 to 28, that a low depth case overcomes the problems and disadvantages of full depth plastic cases (such as the D.W. Plastics case), while the raised lower portion of the D.W. Plastics case with an upper wave edge suggests incorporating a shaped area representing the company logo into the side wall of a bottle case. In our view, one of ordinary skill wishing to enjoy the advantages of a low depth case as disclosed by Apps, but also wishing to incorporate the wave shape of the upper edge of the raised area on the D.W. Plastics case as representative of the company logo would have recognized that the wall of the D.W. Plastics case extends above the wave edge because it is a high

depth case; therefore, in incorporating the wave edge into the Apps case the skilled artisan would not have replicated the window of the D.W. Plastics case (no such window being disclosed by Apps), but instead would simply have eliminated the part of the D.W. Plastics case above the wave edge, leaving the upper edge of the Apps side wall 12 in the wave shape. In this regard, the law presumes that in combining references one of ordinary skill will exercise skill, rather than the converse. In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985). This modification of the Apps case would result in a lower wall portion with a shape, i.e., the periphery, "substantially defined by an integrally molded logo", the logo forming a "structural basis" for the lower wall portion, as called for by part [c] of claim 1.

Appellants' contention that the wave shape on the D.W. Plastic case does not serve as a logo is not tenable in view of appellants' disclosure of wave-shaped upper edge 78 for that purpose. While D.W. Plastics does not suggest making the lower edge of the side wall in a similar wave shape, modification of the Apps case in view of D.W. Plastics to provide a side wall with a wave-shaped upper edge and straight side and bottom edges meets the requirements of claim 1, part [c], in that (1) part [c]

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only calls for the wall periphery to be substantially (not entirely) defined by an integrally molded logo, and (2) we consider that the thus-modified side wall of Apps would have the shape of a "logo", as that term is broadly defined in the specification.

Accordingly, the rejection of claim 1, as well as of claims 2 to 17 which fall therewith, will be sustained.

Conclusion

The examiner's decision to reject claims 1 to 17 is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Paul A. Cohen

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Administrative Patent Judge

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CHARLES E. FRANKFORT

CHARLES E. FRANKFORT
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